UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIFFANY (NJ) INC. and TIFFANY AND COMPANY, Plaintiffs, v. eBAY INC., Defendants.	Case No. 04 Civ. 4607 (KMK)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE THE PROPOSED EXPERT TESTIMONY OF GEORGE MANTIS

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PRELIMINARY STATEMENT

On two occasions a year and a half apart, Tiffany conducted random buying programs for the purchase of Tiffany silver merchandise on eBay pursuant to a protocol designed by George Mantis, a well known survey expert. In 2004, prior to the institution of this suit, 186 items were purchased on eBay. When physically analyzed by Tiffany's quality assurance experts, 73.1% of the items were counterfeit and only 5% were genuine.[1] In mid 2005, a year after the institution of this suit, another 139 such items were randomly purchased on eBay. Seventy-five percent of these were counterfeit versus 12.9% which were genuine.

eBay, which did not even bother to exercise its right to inspect the purchased items in discovery, now seeks to preclude introduction of the results into evidence on the grounds that Mr. Mantis is not an expert in statistics and that the design of the Buying Program is not appropriate to justify a statistical extrapolation of the results.

eBay protests too much. Mr. Mantis has extensive experience in the design of relevant, impartial studies, some of which are probabilistic, which have been accepted into evidence by numerous courts. At most, eBay's criticisms of Mr. Mantis' qualifications go to the weight to be accorded to his testimony, not to its admissibility.

The same is true of eBay's criticisms regarding the relevancy and reliability of the Buying Programs. The Buying Programs were well designed and implemented on a random, unbiased basis. The items selected for bidding were chosen on a random basis without exercise of subjectivity. The results of the Buying Programs demonstrate what eBay knows, but does not want to acknowledge -- it is providing and supporting a venue for the sale of immense quantities of counterfeit Tiffany goods. The Court is entitled to, and should, consider the results of the two Programs as well as Mr. Mantis' testimony.

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[1] The balance, while not genuine, were advertised as "similar to" or "like" Tiffany goods and did not bear the Tiffany trademark on the merchandise itself.

COUNTERSTATEMENT OF FACTS

eBay's description of "What eBay Is And How It Works" appears to be irrelevant to the instant motion and notable more for what it leaves out than what it includes. At trial, it will be shown that eBay actively participates in the business of its sellers and profits from their sales. It profits by taking a listing fee for each item offered and a percentage of the selling price for each item sold. Moreover, it supports its sellers in a variety of ways, including by telling sellers in the Jewelry & Watches category, for example, that "Tiffany" is one of the most searched terms in the category.

eBay also proactively screens its online marketplace for prohibited items such as drugs and firearms, but not for items described as genuine Tiffany goods. As a result, Tiffany bears the burden of reviewing the thousands of "Tiffany" items available daily on eBay and reporting the counterfeits to eBay through eBay's VeRO program.

In describing the "Origin and Purpose of Mr. Mantis' Buying Programs," eBay alleges that:

> the gravamen of Tiffany's infringement claim lies in its contention that 'because of the limited channels of trade for genuine Tiffany merchandise, and based on Tiffany's experience in monitoring eBay's website, a seller who is offering more than a small quantity" - i.e., five or more - "of jewelry items that he or she claims are from Tiffany is almost certainly selling counterfeit Tiffany goods." First Amended Complaint ¶ 33 [sic].[2]

See Memorandum of Law in Support of Defendant's Motion in Limine to Exclude the Proposed Expert Testimony of George Mantis ("eBay Br.") at 2-3. However, Paragraph 34 of the First

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[2] This statement is actually in Paragraph 34 of the First Amended Complaint.

Amended Complaint is part of a section entitled "Plaintiffs' Protest and eBay's Refusal to Cease Selling Counterfeit Jewelry", and Paragraph 34 itself begins with the phrase "Tiffany has advised eBay . . .." The allegations that substantial quantities of counterfeit Tiffany merchandise are being sold on eBay with eBay's knowledge or willful blindness, more accurately describe the gravamen of the Amended Complaint. They appear at Paragraphs 18, 21-24, 40 and 42.

The instant motion is designed to prevent the Court from learning facts critical to this case, namely that on two separate occasions, professionally and independently designed programs to ascertain what level of counterfeit silver jewelry were sold on eBay, revealed that approximately 75% of such items were counterfeit. eBay wants the Court to cast a blind eye on such data, as eBay itself does on a daily basis. The Court should not allow eBay's quibbles with plaintiffs' expert report to divert it from the substance of the data generated by plaintiffs' two Buying Programs.

Mr. Mantis' Qualifications

George Mantis has over thirty years experience in survey design and implementation. Each of the hundreds of surveys he has designed has involved the integral component of statistical sampling. See Declaration of James B. Swire, dated November 20, 2006, Exhibit 1 ("Mantis Tr." at 15.)[3]

Since 1985, Mr. Mantis has run The Mantis Group, a survey research firm that focuses on the administration of surveys in support of litigation. See Mantis Tr. at 11-13. From 1978 to 1985, Mr. Mantis was a vice president at Market Facts, Inc., a large marketing research firm. There, he designed and reported on the results of surveys for clients facing potential litigation.

[3] As Mr. Mantis testified in this case, he has been deposed over one hundred times as an expert and "every report has an observation that has a statistical meaning. So in part, every report rendered in survey research involves some aspects of statistics." Mantis Tr. at 4-6.

Id. at 10-13. Prior to that, he conducted marketing research for Continental Illinois National Bank and Trust Company for nine years. Id. at 10. Throughout his career, Mr. Mantis has also taken courses on statistical sampling. Id. at 8-9.

Mr. Mantis' expertise in the field of survey design is well known. He has spoken before the International Trademark Association, the Midwest Symposium on Intellectual Property, the Chicago Bar Association and he has even lectured on the use of surveys in Lanham Act cases at The John Marshall Law School. Id. at 15-16. Mr. Mantis has been retained as a survey research expert in approximately 300 litigations. Id. at 6-7. Not once has a court denied his expert status. Id. at 18.

The Impartiality and Randomness of the Buying Programs

The universe of "Tiffany" silver merchandise available for sale on eBay changes from hour to hour and day to day as auctions commence and end. Because of that, the buying surveys are not like a confusion study in which one seeks to take the measure of what percentage of consumers will be confused by a particular trademark or trade dress. In such cases, the allegedly infringing merchandise stays constant and a representative sampling of consumers is used to test the level of confusion occasioned by the allegedly infringing merchandise. In the case at bar, the Buying Programs were not designed to test confusion -- by law, a counterfeit mark creates confusion -- they were designed to attempt to impartially ascertain the percentage of "Tiffany" silver merchandise offered for sale on eBay during particular periods of time that were counterfeit.

Mr. Mantis has not and will not opine that on any given day, approximately 75% of the "Tiffany" silver merchandise on eBay is counterfeit. He has and will opine that the buying protocols he designed resulted in a random, unbiased view of the percentage of counterfeit

"Tiffany" silver jewelry offered for sale on eBay during the periods of time that the Buying Programs were conducted.

INTRODUCTION TO ARGUMENT

Not unexpectedly, eBay urgently wants to exclude Mr. Mantis' opinion and testimony (the "Mantis Report") and the conclusions of the Buying Programs. However, its arguments are both legally and factually unsound.

Legally, eBay fails to recognize that under the Federal Rules of Evidence, expert testimony is liberally admissible, i.e. there is a presumption of admissibility. Fed. R. Evid. 702 Advisory Committee Notes, 2000 Amendments ("A review of the caselaw after Daubert [v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)] shows that the rejection of expert testimony is the exception rather than the rule."); Bacardi & Co. Ltd. v. New York Lighter Co., No. 97-CV-7140, 2000 WL 298915, at *2 (E.D.N.Y. Mar. 15, 2000) ("the Second Circuit has adopted a rather broad standard for the admissibility of expert witness testimony); Liriano v. Hobart Corp., 949 F. Supp. 171, 176 (S.D.N.Y. 1996) ("Daubert reinforces the idea that there should be a presumption of admissibility of evidence."); 4 Jack B. Weinstein, Weinstein's Federal Evidence, (hereinafter, "Weinstein") § 702.02[1] (2d ed. 2006) ("The presumption under the Rules is that expert testimony is admissible."). Even assuming that eBay's criticisms are valid, which they are not, the criticisms are hyper-technical and do not constitute grounds for exclusion.

Moreover, eBay's criticisms go to the weight to be accorded to the Mantis Report and the Buying Programs, not to their admissibility. Aside from being incorrect, eBay's nit-picking criticisms are the type that are meant to be voiced through the presentation of contrary evidence and cross-examination during trial, not on a motion in limine to exclude expert testimony. See Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996) ("Although expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of testimony.") (internal quotations and citations omitted); McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995) ("Disputes as to the strength of [the expert's] credentials, faults in his . . . methodology, or lack of textual authority for his opinion, go the weight, not the admissibility of his testimony.") (citation omitted). This is especially true in a bench trial where the court may hear additional evidence to aid in its determination of admissibility without the risk of improperly influencing a jury. See Gonzales v. National Board of Medical Examiners, 225 F.3d 620, 635 (6th Cir. 2000) (Gillman, J. Dissenting), cert. denied, 532 U.S. 1038 (2001) (court in bench trial has substantial flexibility in admitting expert testimony and then making credibility determination during trial) (cited in State of New York v. Solvent Chemical Co. No. 83-CV-1401C, 2006 WL 2640647, at *2 (W.D.N.Y. Sept. 14, 2006)).

Factually, eBay's criticisms of the Buying Programs are simply wrong. Mr. Mantis designed a sound, unbiased protocol for the Buying Programs. The implementation of the Buying Programs followed these protocols. Accordingly, the Mantis Report and the results of the Buying Programs can and should be accepted by the Court.

At bottom, eBay's attack on Mr. Mantis and the Buying Programs comes down to its assertions that Mr. Mantis is not qualified to design a pure probability survey. If eBay were correct in this regard, which it is not, it would affect only Mr. Mantis' assertions regarding the margin of error, plus or minus 6.4% for the 2004 Program and plus or minus 7.1% for the 2005

Program. See Mantis Report at 9-10, attached as Exhibit A to the eBay Brief.[4] It would not affect the fact that the Buying Programs were designed and implemented in a random and unbiased manner and that the results showed that a substantial proportion, 73.1% in 2004 and 75.5% in 2005, of the goods sold as genuine Tiffany silver jewelry were counterfeit.

I. MR. MANTIS IS QUALIFIED TO DESIGN THE BUYING PROGRAM AND OFFER OPINIONS CONCERNING IT

eBay's argument that Mr. Mantis is unqualified to render expert testimony in this case is erroneous for two reasons. First, as it does throughout its motion, eBay fails to consider the presumption of admissibility of expert testimony. As with the other admissibility criteria, a proffered expert's qualifications are liberally interpreted. Second, eBay's criticisms do not bear on the admissibility of the Mantis Report and the Buying Programs. Even if eBay's criticisms are founded, which they are not, they could affect only the weight to be given to the proffered testimony.

A. Mr. Mantis' Thirty Years Experience In Survey Design and Statistical Sampling Qualifies Him To Testify

Federal Rule of Evidence 702 requires that a witness be sufficiently qualified in order to offer expert testimony. Courts in the Second Circuit have adopted a liberal and flexible interpretation of this standard. See, e.g., Lappe v. American Honda Motor Co., 857 F. Supp. 222, 227 (N.D.N.Y. 1994), aff'd sub nom., Lappe v. Honda Motor Co. Ltd. of Japan, 101 F.3d 682 (2d Cir. 1996) ("Liberality and flexibility in evaluating qualifications should be the rule; the proposed expert should be not be required to satisfy an overly narrow test of his own qualifications.") (footnote omitted); see also McCullock, 61 F.3d at 1042 ("The decision to admit expert testimony is left to the broad discretion of the trial judge and will be overturned only when manifestly erroneous.") (citations omitted); United States v. Brown, 776 F.2d 397, 400 (2d Cir. 1985) (qualification requirements of Rule 702 "must be read in light of the liberalizing purpose of the Rule") (citation omitted) cert. denied, 475 U.S. 1141 (1986); Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp., No. 04-CIV-7369, 2006 WL 2128785, at *6 (S.D.N.Y. July 28, 2006); Sullivan v. Ford Motor Co., No. 97-CIV-0593, 2000 WL 343777, at **4-5 (S.D.N.Y. Mar. 31, 2006).

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[4] Indeed, Mr. Mantis protocol contained many of the features of a pure probability sample. Since it has been estimated that 97% of in-person commercial surveys are non-probability studies, which nevertheless are admissible into evidence under Fed. R. Evid. 403, it is ludicrous for eBay to attempt to exclude this survey and its results. See 5 Thomas J. McCarthy, McCarthy on Trademarks and Unfair Competition, §32:165 (4th ed. 2006).

Accordingly, a witness may qualify to render expert testimony through any one of the five ways listed in Rule 702: knowledge, skill, experience, training, or education. Notably, the Rule is phrased in the disjunctive. eBay, however, attempts to rewrite this clearly stated rule by using the conjunctive and claiming that: "[t]o warrant admission, the proponent of expert testimony must demonstrate by a preponderance of the evidence that the witness has the necessary academic training and practical experience to support the opinion." See eBay Br. at 8 (emphasis provided).[5]

eBay's proposition contravenes the clear meaning of Rule 702. The Advisory Committee Notes to the 2000 Amendments to Rule 702 reinforce the fact that one may be qualified as an expert in any one of the five ways listed in the Rule:

> Nothing in this amendment is intended to suggest that experience alone -- or experience in conjunction with other knowledge, skill, training or education -- may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience.

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[5] To support this proposition, eBay inappropriately cites Daubert, 509 U.S. at 592 n.10 (1993), Rule 104(a) and Rule 702. See eBay Br. at 8. Footnote 10 in Daubert simply recites Rule 104(a) (i.e., the Court shall determine witness qualifications, the existence of privileges and the admissibility of evidence) and states that these matters should be established by a preponderance of proof. Rule 702 allows an expert to qualify through any one of the five ways listed.

eBay's interpretation of Rule 702 also ignores well-settled case law and oft-cited commentary that reiterates the liberal qualification standard of Rule 702. See, e.g., Sullivan, 2000 WL 343777, at **4-5 ("In a case where an expert's qualifications are challenged, the test for exclusion is a strict one, and the purported expert must have neither satisfactory knowledge, skill, experience, training nor education on the issue for which the opinion is proffered.") (emphasis provided); McCullock, 61 F.3d at 1041 (engineer with experience in design of manufacturing plants and ventilating systems qualified to testify concerning the impropriety of locating a worker within a "breathing zone" of hot glue pot even though witness lacked formal education related to fume dispersal patterns); Weinstein, § 702.04[1][a] (2d ed. 2006) ("[i]t is an abuse of discretion for a trial court to exclude expert testimony solely on the ground that the witness is not qualified to render the opinion at issue because the witness lacks a certain education or other experiential background.") (footnote omitted); and § 702.04[1][c] ("A witness can qualify as an expert on the basis of 'knowledge, skill, experience, training, or education.' Thus, any one or more of these bases should be sufficient to qualify a witness as an expert.") (footnotes omitted) (citing cases).

eBay cites two cases where expert testimony was deemed inadmissible due to the proffered expert's lack of qualification. See eBay Br. at 8-9, n. 2. In those cases, the witnesses had no experience whatsoever with the subject matter of their proposed testimony; thus the decisions to exclude their testimony were easily made and are distinguishable from the case at bar. In Dreyer v. Ryder Automotive Carrier Group, Inc., the proposed expert was to testify on the design of a specific model of automobile hauler. Although the proposed expert had a doctorate in mechanical engineering, he did not have any experience, education or training in automobile hauler design or in the design of similar machinery. Consequently, the proposed expert was deemed unqualified to render expert testimony. 367 F. Supp. 2d 413, 426-27 (W.D.N.Y. 2005). In Ralston v. Smith & Nephew Richards, Inc., the court deemed the proffered expert unqualified to testify on a type of orthopedic "nailing" procedure. In ruling that her testimony would be excluded, the court stated that, even though she was an orthopedic surgeon, she had no experience with and knew "little - if anything - about" the form of "intramedullary nailing" at issue in the case. 275 F.3d 965, 969 (10th Cir. 2001).

In contrast to the unqualified experts in Dreyer and Ralston, Mr. Mantis has designed impartial surveys for use in litigation and has performed statistical sampling on hundreds of projects over a thirty-year career. See Mantis Tr. at 15. This extensive practical experience qualifies Mr. Mantis to render expert testimony on the statistical sampling utilized in the Buying Programs.

At most, eBay's criticisms bear on the weight, not admissibility, of his testimony. See McCullock, 61 F.3d at 1044 ("Disputes as to the strength of [expert's] credentials . . . go to the weight, not the admissibility of testimony.") (citation omitted); Valentin v. New York City, No. 94-CV-3911, 1997 WL 33323099, at *15 (E.D.N.Y. Sept. 9, 1997) ("[A]ny challenges to an expert's skill, knowledge or credibility go to the weight, not the admissibility of the testimony) (citation omitted) (cited in Johnson & Johnson Vision Care, Inc., 2006 WL 2128785, at *6); Wecshler v. Hunt Health Systems, Ltd., 381 F. Supp. 2d 135, 143 (S.D.N.Y. 2003) (same principle). eBay complains that Mr. Mantis lacks a graduate degree in statistics, never took courses in statistical sampling at the university level, and specializes in consumer confusion surveys. See eBay Br. at 8-9. But, Mr. Mantis has taken courses in statistical sampling through work and various seminars, see Mantis Tr. at 8-9, and, has performed statistical sampling on hundreds of surveys throughout his thirty-year career. In any event, the proper time for eBay to voice these types of complaints is at trial. McCullock, 61 F.3d at 1044.

II. MR. MANTIS' TESTIMONY IS RELEVANT

eBay overreaches badly in arguing that the evidence of extensive sales of counterfeit Tiffany merchandise on eBay, both before and after institution of this action, is not relevant. Its criticisms are simply wrong.

A. The Mantis Report And The Buying Programs Are Relevant To And Support Tiffany's Claim That Substantial Quantities Of "Tiffany" Silver Jewelry Available On eBay Are Counterfeit

In its role as gatekeeper, the Court must determine whether proffered evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less than it would be without the evidence." Fed. R. Evid. 401; see also Campbell ex rel. Campbell v. Metropolitan Property & Casualty Insurance Co., 239 F.3d 179, 184-85 (2d Cir. 2001). As with the other admissibility criteria under Rule 702, the courts liberally interpret the relevance standard. Daubert, 509 U.S. at 587. Accordingly, "[d]oubts about the usefulness of an expert's testimony, should be resolved in favor of admissibility." Canino v. HRP, Inc., 105 F. Supp. 2d 21, 28 (N.D.N.Y. 2000) (citing Marmol v. Biro Manufacturing Co., No. 93-CV-2659, 1997 WL 88854, at *4 (E.D.N.Y. Feb. 24, 1997)).

At the heart of Tiffany's Complaint is the allegation that substantial quantities of counterfeit "Tiffany" jewelry are being sold on eBay. The fact that approximately 75% of Tiffany silver jewelry purchased on eBay during Tiffany's 2004 and 2005 Buying Programs certainly supports Tiffany's allegations. The Buying Programs were conducted on a random and unbiased basis. Accordingly, the Mantis Report is clearly relevant to central issues in this action.

B. eBay's Criticisms Affect The Weight To Be Given To The Mantis Report And The Buying Programs, Not Admissibility

As with the attack on Mr. Mantis' credentials, eBay's relevancy complaints, even if they are to be given any merit, go to the weight to be given to the Mantis Report and to the Buying Programs, not to their admissibility. See EEOC v. Morgan Stanley, 324 F. Supp. 2d 451 (S.D.N.Y. 2004), aff'd in part, 2004 WL 1542264 (S.D.N.Y. July 8, 2004).[6] This is especially true given that this is a bench trial, where courts presented with a motion to exclude expert testimony may, and often do, wait for the cross-examination of the proposed expert and the presentation of contrary evidence to assist in its determination of admissibility. See Gonzales, 225 F.3d at 635 (Gillman, J. Dissenting) (district courts conducting bench trials have substantial flexibility in admitting proffered expert testimony at the front end, and then deciding for themselves during the course of trial whether evidence deserves to be credited by meeting requirements of Kumho Tire [Co. v. Carmichael, 526 U.S. 137 (1999)] and Daubert) (cited in Solvent Chemical Co., 2006 WL 2640647, at *2). See also Ekotek Site PRP Committee v. Self, 1 F. Supp. 2d 1282, 1296 n.5 (D. Utah 1998) (district courts presiding over bench trials can decide questions of admissibility and reliability after proffered evidence is presented at trial) (cited in Solvent Chemical Co., 2006 WL 2640647, at *2); Nicholls v. Tufenkian Import/Export Ventures, Inc., 367 F. Supp. 2d 514, 517 n.1 (S.D.N.Y. 2005); American Home Assurance Co. v. Masters Ships Management S.A., No. 03-CIV-0618, 2005 WL 159592, at *1 (S.D.N.Y. Jan. 25, 2005); Henry v. Champlain Enterprises, Inc., 288 F. Supp. 2d 202, 221 (N.D.N.Y. 2003) (expert

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[6] There, Morgan Stanley moved to exclude expert testimony that supported the EEOC's claim of gender discrimination against it. Morgan Stanley claimed that the expert had created an improper population for his statistical study and it was thus "unreliable and irrelevant." Id. at 457. Without commenting on the merit of Morgan Stanley's complaints, the court admitted the expert's testimony, stating that "an evaluation of [the expert's] testimony should be left to the jury and that Morgan Stanely's criticisms should be raised on cross-examination. Id. at 458. The court also stated that "[d]isputes regarding the proper variables to employ in statistical studies are more properly left for juries to consider and decide." Id.

testimony will be in context of a bench trial "and this judge is quite confident in his ability to separate the wheat from the chaff. . . .").

As in the Morgan Stanley case, eBay's criticism of the statistical methodology employed by Mr. Mantis in the Buying Programs does not form the proper basis for a Rule 702 motion. Such criticisms should be heard during trial through the presentation of contrary evidence and cross-examination of Mr. Mantis, not on a motion in limine to exclude his testimony. In any event, as described below, eBay's complaints regarding the population used in the Buying Programs are unsound.

i. As eBay Well Knows, The Most Significant Problem Tiffany Has With eBay Concerns The Sale Of Silver Jewelry In eBay's "Jewelry And Watches" Category

eBay's attempts to discredit the Buying Programs in hopes of proving their irrelevancy to Tiffany's claims are without merit. eBay has long since learned in discovery that Tiffany's principal concern in this litigation regards the sale of silver jewelry.[7] Such products are offered for sale within eBay's Jewelry & Watches category; that is why "Jewelry & Watches" was part of the search criteria. Indeed, early on in discovery, Tiffany agreed to limit many of its discovery requests to eBay to jewelry items, of which silver items are by far the biggest seller. Moreover, eBay, on its own initiative, produced sales information limited to "Tiffany" silver jewelry items. See Tiffany Exhibit 394 at EBAY19 0120 and EBAY19 0122.

Accordingly, eBay's attack on the Buying Programs for having centered on the sale of silver merchandise is disingenuous. The greatest amount of counterfeiting of the TIFFANY mark currently occurs with silver merchandise and, accordingly, that is where Tiffany has focused its efforts. That is where the Court, should it rule for plaintiffs, will likely focus its efforts in crafting relief. The Buying Programs are directly relevant to that category of goods.

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[7] See Joint Pretrial Order, p. 2.

ii. The Other Search Terms Used Are Also Appropriate

eBay complains that the Buying Programs' search terms did not include non-jewelry items, gold and platinum items, or even silver jewelry that did not use "sterling". See eBay Br. at 5. As explained above, the focus of the counterfeiting problem concerns silver jewelry. For that reason, the focus of the Buying Programs was on silver jewelry. The Buying Programs are relevant for what they demonstrate regarding the sale of silver jewelry on eBay.

The argument that the search terms were improperly limited to sterling silver is incorrect. By definition, "sterling" is generic for a type of silver[8] and the fact is that in the Buying Programs the search term "Tiffany sterling" elicited more silver items in the Buying Programs which did not include the word "sterling" than which did.[9]

Defendant argues, without supporting reference, that sellers on eBay are more likely to use "silver" than "sterling" to describe silver jewelry. See eBay Br. at 5. Even assuming arguendo that is correct, since "sterling" defines a higher quality of silver, one would expect that by using "sterling", Tiffany's program would be likely to turn up a greater number of genuine goods since counterfeiters are more likely to use shoddier, lower-priced ingredients.

eBay argues, as well, that the search terms used in the Buying Programs did not include a key indicator of counterfeit selling -- the sale of 5 or more "Tiffany" pieces. Had Tiffany included such an indicator, of course, it truly would have been doing what eBay said it should not -- seeking out counterfeits rather than impartially testing to see what percentage of "Tiffany" silver merchandise available on eBay was counterfeit. See eBay Br. at 5.

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[8] Sterling contains at least 92.5% silver. See WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1314(Third College Edition (1988).

[9] There were 186 items purchased in the 2004 Buying Program. Fifty-seven items purchased contained "silver" in the seller's listing; 38 contained "sterling" and 30 contained both "silver" and "sterling." There were 139 items purchased in the 2005 Buying Program. Fifty items purchased contained "silver" in the seller's listing; 32 contained "sterling" and 30 contained both "silver" and "sterling."

The fact is that Tiffany's search terms were entirely appropriate.[10] As noted above, the use of "Tiffany sterling" was not biased toward counterfeit listings. The use of the "Jewelry and Watches" category was obviously appropriate -- that is where jewelry is sold on eBay. Moreover, the exclusion of the words:

> "like, similar, setting, style, CZ, settings, amber, charm, turquoise, vintage, navajo"

was proper. This case is not about the sale of merchandise that is "like" or "similar" to Tiffany merchandise. It is not about generic terms such as a Tiffany "setting" or Tiffany "turquoise" gems. It is about jewelry falsely sold as genuine Tiffany merchandise.

iii. Tiffany's VeRO Efforts Had To Be Suspended During The Buying Programs To Assure Accurate Results

It is true that Tiffany suspended its participation in eBay's VeRO program during the period of the Buying Programs. This was required to allow all Tiffany items to have an equal and independent chance for selection. See Exhibit A to the Mantis Report (the "Buying Program Protocol") at 1-2, which is attached as Exhibit A to the eBay Brief. It also prevented items which were in the process of being purchased by paralegals in the Buying Programs from being removed at the last minute by eBay because of a VeRO filing by Tiffany. Clearly, suspending

[10] The fact that one of Tiffany's employees used these search terms during participation in eBay's VeRO program (i.e., in order to find and report counterfeits to eBay), in no way discredits their use in the Buying Programs. The fact is that the terms used were impartial and appropriate to the task.

VeRO filings during the Buying Programs allowed the results to constitute a true reading of the percentage of Tiffany offerings on eBay in the particular time periods that were studied.[11]

III. MR. MANTIS' TESTIMONY IS RELIABLE

As with its complaints about Mr. Mantis' qualifications and the relevancy of his proposed testimony, eBay's argument regarding reliability is flawed because: (A) it is inconsistent with the liberal interpretation of the reliability criteria under Rule 702 and (B) it could only possibly go to the weight to be accorded the Mantis Report and the Buying Programs, not to their admissibility. eBay's objections regarding reliability are also trivial and factually invalid.

A. The Mantis Report And The Buying Programs Satisfy The Reliability Standard Under Rule 702

It is well-settled that the reliability standard for admissibility of expert testimony is a liberal one. Courts will exclude expert testimony only "if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory that as to suggest bad faith or to be in essence an apples and oranges comparison . . .." Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996) (internal citations and quotations omitted). Mr. Mantis' testimony is far from "speculative," "conjectural," "unrealistic" or an "apples and oranges comparison," and it certainly does not suggest bad faith.

B. eBay's Reliability Criticisms Affect The Weight To Be Given To The Mantis Report And The Buying Programs, Not Admissibility

eBay complains that flaws in the methodology and implementation of the Buying Programs make them unreliable. See eBay Br. at 14-16. As with eBay's other criticisms, at most, this goes to the weight of the Mr. Mantis' testimony, not to admissibility. See EEOC v.

[11] eBay is supplying the venue, directing buyers to Tiffany listings, actively supporting its vendors and taking a percentage of the sales price. Under these circumstances, it should be eBay's burden, not Tiffany's, to police eBay's marketplace for counterfeits.

Morgan Stanley, 324 F. Supp. 2d at 457-58. See also Ulico Casualty Co. v. Clover Capital Management, Inc., 217 F. Supp. 2d 311, 318 (N.D.N.Y. 2002) ("Attacks relating to the faults in the expert's methodology and lack of textual authority for the opinion all are improper criteria for advancing a motion under 702.") (citation omitted) (citing McCullock, 61 F.3d at 1043-44 (dispute as to an expert's methodology goes to the weight, not the admissibility of his testimony)).[12] These criticisms should be heard during trial not on a motion in limine to exclude Mr. Mantis' testimony. In any event, as described below, eBay's complaints regarding the reliability of the Mantis Report and the Buying Programs are unpersuasive.

C. eBay's Reliability Criticisms Lack Factual Merit

eBay's argument that 10-day listings had a greater chance of being selected than shorter listings, like Buy It Now listings (see eBay Br. at 15), is a quibble without merit. Indeed, because counterfeiters do not want to risk having their auctions taken down, they want to achieve quick sales and are more likely to resort to one day or Buy It Now listings. Accordingly, assuming arguendo that 10-day listings had a greater chance of being selected, any bias created would have resulted in the Buying Programs showing fewer, rather than greater, purchases of counterfeits.[13]

eBay also complains that the results of the Buying Programs are unreliable because in each instance, the paralegals purchased less than the 200 items called for by the protocol (186 in 2004 and 139 in 2005). See eBay Br. at 16. eBay ignores Mr. Mantis' deposition testimony where he states that this had no significance on the results and that even 100 items would have produced a reasonable sample size. See Mantis Tr. at 79. This is a classic example of the type of criticism that goes to weight, not to admissibility. See EEOC v. Morgan Stanley, 324 F. Supp. 2d 451.

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[12] Schering Corp. v. Pfizer Inc., 189 F.3d 218, 225-28 (2d Cir. 1999) also supports the proposition that criticisms about methodology go to weight, not admissibility. While eBay cites this case as authority for the reliability criteria of consumer survey design (and is thus inapposite because the Buying Programs are not consumer surveys), eBay fails to note that the same opinion states that errors in a survey's methodology "properly go only to the weight of the evidence . . . ." Id. at 228.

[13] In any event, the instruction to the paralegals was to use Buy It Now whenever available. See the Buying Program Protocol at p. 7, attached as Exhibit A to the eBay Brief.

Similarly, eBay's suggestion that Mr. Mantis should have required use of professional survey employees to bid on and buy the goods, instead of paralegals (see eBay Br. at 16), fails to withstand analysis. While there may be skills required of interviewers in confusion surveys as to how to interview respondents and record their responses, no such special skills are required here. The paralegals were in the position of any potential buyer of merchandise on eBay; they were given clear instructions as to which items to bid for and what to do with the items they purchased. Like any buyers or bidders on eBay, they had no face to face or telephonic interchange with the sellers. The paralegals exercised no discretion as to purchase options and there is no evidence that the paralegals knew of the purpose of the Buying Programs. Even if they did, their job was to follow a strict protocol and to purchase only what they were told to purchase. There is no evidence that they varied from their instructions.

CONCLUSION

None of eBay's potpourri of criticisms of the buying program justify its exclusion. The Court should listen to the testimony concerning how it was designed and implemented and what it showed. It should reach its own conclusions as to what weight it should be accorded. The motion in limine should be denied.

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